EX PARTE OR LATE FILED

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	
IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996	**CC Docket No. 96-98**

MOTION TO ACCEPT LATE-FILED PLEADING

The Telecommunications Resellers Association ("TRA"), through undersigned counsel, hereby requests that the Commission accept the attached "Opposition to Petitions for Reconsideration" submitted in response to certain petitions for reconsideration to the First Report and Order in the above-captioned proceeding one day late. As will be shown below, good cause exists for the grant of TRA's Motion.

TRA experienced technical difficulties in connection with the electronic transmission of the above-referenced Opposition which prevented TRA from delivering a paper version of the Opposition to the Office of the Secretary prior to the end of the Commission's official workday.

Grant of TRA's Motion would not result in harm to any party to this proceeding. Simultaneously with delivery of the Opposition to the Commission, copies are being hand-delivered to all parties on the attached service list. Accordingly, these parties will receive TRA's Opposition within the same time period as if TRA's Opposition had been served upon the parties by mail yesterday.

Good cause having been shown, TRA respectfully requests that the Commission grant its Motion and permit it to file its Opposition in the above-referenced docket one day late.

Respectfully submitted,

TELECOMMUNICATIONS RESELLERS ASSOCIATION

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November 1, 1996

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REPLY OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION TO PETITIONS FOR RECONSIDERATION

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REPLY OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION TO PETITIONS FOR RECONSIDERATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), hereby replies to selected petitions for reconsideration of the Commission's First Report and Order, FCC 96-325, released by the Commission in the captioned docket on August 8, 1996. Specifically, TRA will respond herein in opposition to all or part of petitions filed by Time Warner Communications, Inc. ("Time Warner"), the National Cable Television Association, Inc. ("NCTA"), and the Local Exchange Carrier Coalition ("LEC Coalition").

I.

INTRODUCTION

An association comprised of nearly 500 entities engaged in, or providing products and services in support of, telecommunications resale, TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications

resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless (including cellular, PCS and paging), enhanced and internet services. TRA's resale carrier members will also be among the many new market entrants that will soon be offering local exchange telecommunications services, generally through traditional "total service" resale of incumbent LEC ("ILEC") or competitive LEC ("CLEC") retail service offerings or by recombining unbundled network elements obtained from ILECs to create "virtual local exchange networks."

TRA has been an active participant in this proceeding, filing with the Commission multiple rounds of comments and reply comments, oppositions to requests for stay and various *ex parte* materials. TRA has also intervened before the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") in the consolidated appeals of the First Report and Order and has joined with other intervenors in petitioning the United States Supreme Court to vacate the stay imposed by the Eighth Circuit on the pricing and "pick and choose" provisions of the First Report and Order.[1]

TRA's interest in this proceeding has been, and continues to be, in securing for its members and other small to mid-sized resale carriers economically and operationally viable opportunities to engage in the non-facilities-based provision of local telecommunications services, as well as in speeding the emergence and growth of the facilities-based local exchange/exchange access services competition that will be necessary to ensure the long-term success of local

[1] Iowa Utilities Board v. FCC (Order Granting Stay Pending Judicial Review), Case No. 96-3321 (8th Cir. Oct. 15, 1996).

telecommunications resale and other forms of non-facilities-based local service provision. TRA firmly believes that the First Report and Order has provided small to mid-sized resale carriers with such economically and operationally viable opportunities for non-facilities-based entry into the local exchange telecommunications market. TRA applauds the Commission for its recognition that the Telecommunications Act of 1996 ("1996 Act")[2] contemplates three separate and coequal paths of entry into the local market, one of which is traditional "total service" resale, and requires elimination of statutory and regulatory barriers and removal of economic impediments to all three entry vehicles.[3] And TRA commends the Commission for its recognition that the 1996 Act "neither explicitly nor implicitly expresses a preference for one particular entry strategy" and that any attempt to prefer one strategy over another would be "undesirable."[4]

The petitions for reconsideration TRA herein opposes seek to undermine the viability of traditional "total service" resale as a local market entry strategy, either by reducing the differential between "wholesale" and "retail" prices, by carving out exceptions to the services that must be made available for resale or by otherwise undermining the competitive viability of resale providers. TRA strongly urges the Commission to resist these efforts and to fulfill its recognized obligation to implement three viable pro-competitive entry vehicles.[5]

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[2] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[3] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, ¶ 12 (released August 8, 1996), *pet. for rev. pending sub nom.* Iowa Utilities Board v. FCC, Case No. 96-3321 (8th Cir. Sept. 5, 1996) ("Local Competition Order").

[4] Id.

[5] Id.

II.

ARGUMENT

A. The Commission Correctly Interpreted and Applied Section 252(d)(3)

In the First Report and Order, the Commission concluded that in calculating the differential between "wholesale" and "retail" prices pursuant to Section 252(d)(3) of the 1996 Act,[6] "the 'portion [of the retail rate] . . . attributable to costs that will be avoided' includes all of the costs that the LEC incurs in maintaining a retail, as opposed to a wholesale, business."[7] As the Commission explained, "the avoided costs are those that an incumbent LEC would no longer incur if it were to cease retail operations and instead provide all of its services through resellers."[8] Thus, the Commission interpreted the 1996 Act to require the States "to make an objective assessment of what costs are reasonably avoidable when a LEC sells its services wholesale."[9] To assist the States in this undertaking, the Commission identified certain cost and expense accounts in the Commission's Uniform Systems of Accounts ("USOA") which would be presumed to be, in whole or in part, "avoidable."[10] Among the avoidable costs so identified were indirect, as well as direct, costs and a *pro rata* portion of contribution.[11] As the Commission explained, "the overall level of indirect expenses can reasonably be expected to decrease as a

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6 47 U.S.C. § 252(d)(3).

7 Local Competition Order, FCC 96-325 at ¶ 911.

8 Id.

9 Id.

10 Id. at ¶¶ 917 - 920.

11 Id. at ¶¶ 912 - 913.

result of a lower level of overall operations resulting from a reduction in retail activity" and "[a] portion of contribution, profits or mark-up may also be considered 'attributable to costs that will be avoided' when services are sold wholesale."[12] Finally, the Commission provided a "default range of wholesale discount rates" which the States could use until such time as they had undertaken a full fledged avoided-cost study.[13]

Time Warner and NCTA object to, and urge reconsideration of, the Commission's reading of Section 252(d)(3), arguing that Section 252(d)(3) mandates use of an "actually avoided" rather than a "reasonably avoidable" standard.[14] These petitioners also object to inclusion of a number of USOA cost and expense accounts in the avoidable cost basket.[15] Finally, Time Warner challenged as arbitrary the default range of wholesale discounts established in the First Report and Order.[16] TRA urges the Commission to summarily reject these reconsideration requests.

First, the arguments presented by Time Warner and NCTA in support of their reconsideration requests have already been raised before, and addressed and rejected by, the Commission. Thus, the Commission "reject[ed] the arguments of incumbent LECs and others who maintain that the LEC must actually experience a reduction in its operating expenses for a cost to be considered 'avoided' for purposes of section 252(d)(3)."[17] The Commission rejected

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[12] Id.

[13] Id. at ¶¶ 932 - 933.

[14] Comments of Time Warner at 3 - 6; Comments of NCTA at 14 - 16.

[15] Comments of Time Warner at 7 - 17; Comments of NCTA at 16 - 20.

[16] Comments of Time Warner at 17 - 18.

[17] Id. at ¶ 911.

Time Warner's argument that "joint, common and overhead costs should not be included in the calculation of avoided costs."[18] The Commission rejected claims that "there is no statutory basis for . . . use of a formula that removes the markup associated with avoided retail expenses from the retail rates."[19] The Commission rejected arguments by Time Warner that identification of certain USOA cost and expense accounts as avoidable was inappropriate.[20] And the Commission rejected "NCTA's argument that discount rates should be ten percent or less in order to avoid discouraging facilities-based competition."[21]

Second, the Time Warner/NCTA reconsideration requests are inconsistent with the will of Congress. Essentially, Time Warner and NCTA are suggesting that facilities-based competition is a preferable form of competition and hence should be insulated from aggressive competition from resale carriers. Apart from the fact that it is rather base and unbecoming for a new market entrant, even before it enters the market, to start aping the behavior of an incumbent attempting to protect its turf, Congress, as the Commission has recognized, did not anoint cable television companies or other entities that install one or more physical facilities in a market as the sole potential competitors of the ILECs. As noted above, the 1996 Act "contemplates three paths of entry into the local market" and "neither implicitly nor explicitly expresses a preference for one particular entry strategy."[22] Moreover, as the Commission has correctly recognized, the 1996 Act is "pro-competition," not "pro-competitor;" just as Congress

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[18] Id. at ¶ 887.

[19] Id. at ¶ 894.

[20] Id. at ¶ 897.

[21] Id. at ¶ 914.

[22] Id. at ¶ 12.

did not intend to favor incumbents over new market entrants, neither did it intend to favor one group of new market entrants over another. Plain and simple, Congress intended to promote competition, not any particular form of competition.[23]

Moreover, it is particularly unseemly for entities which will have a competitive leg up to seek to hamstring competitors which will not be possessed of like advantages. The cable companies already have loop facilities in place. The cable companies will complete their networks with unbundled network elements which they will be able to obtain from the ILECs at cost. As full or partial facilities-based providers, the cable companies will be less dependant on the ILECs and hence not only less susceptible to anticompetitive abuses, but far better able to structure unique service offerings. The large cable companies such as Time Warner have ready access to substantial capital and operational resources. All cable companies already have built-in local customer bases. Yet these entities seek to diminish the already limited margins available to, thereby undermining the competitive viability of, resale carriers who are totally reliant upon, and hence far more vulnerable to abuses by, the ILECs, who must compete with services wholly defined by, and acquired at rates well in excess of cost from, the ILECs, and who are often small to mid-sized providers whose access to capital and operational resources pale in comparison to the Time Warners of this world. As the Commission noted, "[r]esale will . . . be an important entry strategy for small businesses that may lack capital to compete in the local exchange market by purchasing unbundled elements or by building their own networks."[24]

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[23] Id. at ¶ 618; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Notice of Proposed Rulemaking), CC Docket No. 96-98, FCC 96-182, ¶ 12 (released April 19, 1996) "Local Competition NPRM".

[24] Local Competition Order, FCC 96-325 at ¶ 907.

Third, the interpretation of Section 252(d)(3) advocated by Time Warner and NCTA would effectively eliminate resale as a market entry vehicle, thereby ensuring that enactment of Section 251(c)(4) was a meaningless exercise.[25] It is hornbook law that statutory provisions should not be construed so as to be rendered meaningless.[26] But as the Commission correctly recognized, if Section 252(d)(3) provided for an "actually avoided" standard, ILECs would be able to eliminate any differential between wholesale and retail prices simply by "sustain[ing] artificially high wholesale prices by declining to reduce their expenditures to the degree that certain costs are readily avoidable."[27] Was Congress so naive -- indeed, so witless -- to incorporate into a statutory requirement imposed on the ILECs a ready means of altogether avoiding that obligation, thereby ensuring that other provisions of the 1996 Act would not contribute to the achievement of clearly-articulated Congressional goals?

The Commission's "reasonably avoidable" standard both fits within the reasonable bounds of the text of Section 252(d)(3) and gives meaning to the Congressional identification of resale as a coequal market entry vehicle. Yes, Section 252(d)(3) makes reference to "the portion [of retail rates] . . . attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier" (emphasis added). But the phrase "will be avoided" can be reasonably interpreted to apply to costs an ILEC "would no longer incur if it were to cease

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[25] 47 U.S.C. § 251(c)(4).

[26] Rosado v. Wyman, 397 U.S. 397, 415 (1970) ("the courts should construe all legislative enactments to give them some meaning"); U.S. v. Jersey Shore State Bank, 781 F.2d 974, 977 (3d Cir. 1986) ("any construction of a particular statutory scheme a 'dead letter' is disfavored and to be avoided"); Marsano v. Laird, 412 F.2d 65, 70 (2d Cir.) ("an interpretation which emasculates [a statute] should be avoided if possible"); Wilshire Oil Co. of Cal. v. Costello, 384 F.2d 241 (9th Cir. 1965) (statute should not be construed so as to be rendered meaningless).

[27] Local Competition Order, FCC 96-325 at ¶ 911.

retail operations and instead provide all of its services through resellers."[28] A carrier that acts solely as a wholesale provider obviously will avoid costs that a carrier that provides retail service will continue to incur.

Moreover, the Commission's approach is implementable, allowing the States to create uniform guidelines applicable over time. If Section 252(d)(3) required a determination of "actually avoided costs," not only would detailed rate studies be required for each individual ILEC, but those studies would be out of date long before they were completed. "Actually avoided" costs would change every time an ILEC expended resources on its wholesale operations; indeed, to the extent a State found a differential between wholesale and resale prices, an ILEC would have only to strategically manipulate its wholesale costs to eliminate this unwanted price gap. In other words, in the offbeat chance that an "actually avoided" cost standard did not render Section 251(c)(4) a meaningless exercise, it would create an administrative nightmare for the States. It is quite possible that it is for this, as well as other reasons, that the Colorado, Georgia, Illinois, New York, and Ohio commissions have all interpreted Section 252(d)(3) in a manner consistent with the Commission's reading of the provision.[29]

With respect to its objections to the Commission's inclusions of individual USOA cost and expense accounts among those presumed to be "avoidable," in whole or in part, TRA urges the Commission to decline to participate in the meaningless exercise which Time Warner and NCTA seek here. Debating which elements of an individual USOA cost or expense account are avoidable through resale and which are not is akin to counting the number of angels on the

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[28] Id.

[29] Id.

head of a pin. Yes, an ILEC might expend funds marketing its wholesale products, but it is equally likely that the ILEC may elect not to make any effort to attract wholesale customers through promotional activities. Yes, an ILEC may incur costs selling a wholesale offering, but are these costs properly classified as sales costs or costs associated with regulatory compliance. Yes, general overhead expenses will not necessarily decline immediately with the advent of wholesale offerings, but they may ultimately decrease as a result of a lower level of overall operations resulting from a reduction in retail activity.

Obviously, there can be no certainty with respect to the USOA cost and expense accounts treated, in whole or in part, as "avoidable." This, of course, is why the Commission created rebuttable assumptions, rather than absolute requirements.[30] As the Commission took pains to explain, these presumptions "may be rebutted if an incumbent LEC proves to the state commission that specific costs in these accounts will be incurred with respect to services sold at wholesale, or that costs in these accounts are not included in the retail prices of the resold services."[31] The Commission has made reasoned judgments in identifying avoidable cost categories and has done so on the basis of a voluminous record reflecting myriad viewpoints; Time Warner and NCTA propose different, but certainly no more compelling, assessments. While neither the Commission's nor Time Warner's perspective will be right in all instances for all carriers, the Commission has incorporated into its rules more than adequate flexibility to permit the States to arrive at reasonable results in all such instances for all such carriers.

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[30] Id. at ¶ 917.

[31] Id.

Nothing proffered by Time Warner or NCTA in requesting reconsideration would improve the mechanism created by the Commission for determining avoidable costs.

Even weaker still are Time Warner's claims that the default range of wholesale discounts established by the Commission is arbitrary and without basis in the record. Time Warner complains that the range is excessive and unsupported and expresses fear that even if only used on an interim basis, this flawed range will become the *de facto* range of wholesale discounts. Time Warner not only mischaracterizes the record in this proceeding, but seemingly dismisses the States as lemming-like.

First, the First Report and Order sets forth in great detail the foundation upon which the default range of wholesale discounts was constructed.[32] The Commission detailed the ranges recommended by the commenters and reviewed the discounts that had already been adopted by the various States. The Commission reviewed the models and policy arguments upon which the parties recommendations were predicated. Ultimately, the Commission concluded that the model submitted by MCI represented a "reasonable attempt at estimating avoided cost in accordance with section 252(d)(3) using only publicly-available data," but not without making significant adjustments to the MCI model, based in part upon findings made by various States.[33] The Commission then developed a broad range of discounts to reflect both the findings of the many States that had already computed wholesale rates and the results of the modified MCI

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[32] Id. at ¶¶ 921 - 934.

[33] Id. at ¶¶ 925 - 929.

model, emphasizing its desire to "give state commissions flexibility in addressing circumstances of incumbent LECs serving their states."[34]

It is hard to imagine a more detailed analysis and a more flexible approach. Moreover, it is hard to imagine a more compelling need for a default range. As the Commission correctly noted, "[r]esale will be an important entry strategy for many new entrants . . . [and] an important entry strategy for small businesses" in particular.[35] "In light of the strategic importance of resale to the development of competition, . . . it is especially important to promulgate national rules for use by state commissions in setting wholesale rates."[36] And the default range obviously speeds market entry by avoiding the need to await the completion of avoided cost studies.

B. The Commission Should Reject Efforts to Impose Restrictions on Resale

Time Warner and the LEC Coalition seek to resurrect restrictions on resale which the Commission has rejected as unreasonable. In the First Report and Order, the Commission concluded that "resale restrictions are presumptively unreasonable."[37] While this presumption is rebuttable, any resale restriction must be "narrowly tailored."[38] As the Commission explained, "[g]iven the probability that restrictions and conditions may have anticompetitive results, we conclude that it is consistent with the procompetitive goals of the 1996 Act to presume resale

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[34] Id. at ¶¶ 932 - 934.

[35] Id. at ¶ 907.

[36] Id.

[37] Id. at ¶ 939.

[38] Id.

restrictions and conditions to be unreasonable and therefore in violation of section 251(c)(4)."[39] Accordingly, the Commission rejected virtually all restrictions on resale proposed by the ILECs (and Time Warner), exempting from the resale requirement only promotional offerings of limited duration and certain "cross-class" offerings.[40]

Undaunted, Time Warner proposes to preclude resale carriers from obtaining unbundled network elements. For its part, the LEC Coalition seeks to exclude customer-specific contracts from an ILEC's resale obligations and to deny resale carriers the benefit of operations support and rebranding. These reconsideration requests should be rejected as inconsistent with the 1996 Act, as well as redundant, having already been raised before, and addressed and rejected by, the Commission.

Time Warner asserts that the "ability to 'mix and match' wholesale ILEC services for resale with unbundled network elements is not contemplated by the Act and should not be permitted by the Commission."[41] In support of this bold assertion, Time Warner cites the ability of a telecommunications carrier to obtain at wholesale rates "any telecommunications service" that an ILEC provides at retail. Time Warner then seemingly makes the remarkable logical leap to the assumption that a resale carriers must take all retail services provided by an ILEC and may not supplement the services it obtains at wholesale with unbundled network elements. To hold otherwise, Time Warner suggests, would be to enable resale carriers to "create hybrid services comprised of 'stripped down' versions of the retail services provided to end users customized by

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[39] Id.

[40] Id. at ¶¶ 940 - 964.

[41] Comments of Time Warner at iii.

selection of certain components of those retail services from the menu of unbundled network elements."[42] And this of course would permit resale carriers to better serve their customers and compete more effectively with Time Warner.

The answer is simple and straightforward. Section 251(c)(3) permits telecommunications carriers to obtain from ILECs nondiscriminatory access at any technically feasible point to network elements on an unbundled basis and to combine such elements in order to provide telecommunications services.[43] Section 251(c)(4) permits telecommunications carriers to obtain at wholesale rates for purposes of resale any telecommunications service that an ILEC offers at retail.[44] Nowhere in either Section 251(c)(3) or Section 251(c)(4) is the limitation Time Warner seeks to graft onto the 1996 Act. Nowhere in either Section 251(c)(3) or Section 251(c)(4) or elsewhere in the 1996 Act is there a suggestion that an entity forgoes rights it otherwise has as a telecommunications carrier simply because it elects to resale local service.

The LEC Coalition's suggestion that customer-specific contracts should be excluded from the Section 251(c)(4) resale requirement flies in the face of the 1996 Act and the Commission's reasoned interpretation of Section 251(c)(4).[45] The 1996 Act clearly requires that all services an ILEC provides at retail to subscribers other than telecommunications carriers must be made available for resale at wholesale rates and that no unreasonable or discriminatory conditions or limitations may be imposed on such resale.[46] As the Commission correctly

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[42] Comments of Time Warner at 18 - 22.

[43] 47 U.S.C. § 252(d)(3).

[44] 47 U.S.C. § 251(c)(4).

[45] Comments of LEC Coalition at 2 - 3.

[46] 47 U.S.C. § 251(c)(4).

recognized, "[t]his language makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings."[47] Moreover, the policy rational underlying this action is even more compelling. As the Commission astutely noted, "[a] contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act."[48] Contrary to the LEC Coalition's claims, the Commission did not misconstrue the nature of customer-specific contracts; rather it correctly assessed them as the convenient vehicle for avoiding statutory obligations that they are.

Other matters of which the LEC Coalition complain are critical to the viability of local service resale.[49] Operations support and rebranding are, as the Commission has recognized, critical to the competitive viability of new market entrants challenging an entrenched monopoly incumbent. TRA can not stress strongly enough how remarkably on point the Commission was in concluding that "if competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged, if not precluded altogether, from fairly competing."[50] Likewise, the Commission was absolutely correct that "[b]rand identification is likely to play a major role in markets where resellers compete with incumbent LECs for provision of local and

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[47] Local Competition Order, FCC 96-325 at ¶ 948.

[48] Id.

[49] Comments of LEC Coalition at 4 - 5, 20 - 22.

[50] Local Competition Order, FCC 96-325 at ¶ 518.

toll service."[51] "Incumbent LECs are advantaged when reseller end users are advised that the service is being provided by the reseller's primary competitor."[52]

There will always be reasons for delaying or watering down such critical competitive elements. There will always be a costs involved in the provision of competitive necessities. But the reasons for delay and the costs of deployment pale in comparison to the competitive damage that the absence of these competitive elements will occasion. TRA, accordingly, urges the Commission to hold fast in its determinations, granting waivers where absolutely necessary, but maintaining as a rule the strict timelines and requirements it adopted in the First Report and Order. Waivers can address the concerns of the smaller, less technologically advanced, ILECs without hindering the movement toward a competitive local exchange telecommunications market.

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[51] Id. at ¶ 971.

[52] Id.

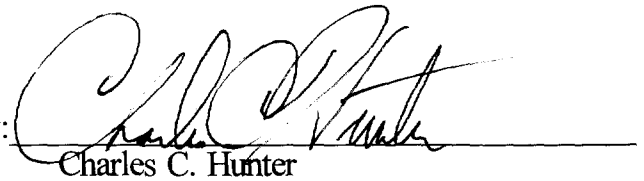
III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to reject to the extent noted herein the petitions seeking reconsideration of the First Report and Order filed by Time Warner Communications, Inc.,, the National Cable Television Association, Inc., and the Local Exchange Carrier Coalition.

Respectfully submitted,

TELECOMMUNICATIONS RESELLERS ASSOCIATION

By: 

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